(1)

Supreme Court, U.S.
FILED

96 237 JUN 18 1996

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October, 1995

DAVID LOCKMILLER,

Petitioner,

v.

SUPERIOR COURT OF SANTA CLARA COUNTY,

Respondent.

To the Court of Appeal of the State of California
Sixth Appellate District

PETITION FOR WRIT OF CERTIORARI

David Lockmiller
In Pro Per
1552 Redwood Highway
Corte Madera, CA 94925
(415) 924-0550

36 pp

CONSTITUTIONAL QUESTIONS

I. Is it a violation of a citizen's state and federal constitutional due process of law rights for a state court of appeal to refuse to consider "on the merits" a citizen's petition of appeal because the citizen is not represented by legal counsel?

II. Is it a violation of a citizen's state and federal constitutional due process of law rights for a state court of appeal to refuse to apply binding authority case law precedent mandating, under the requisite and appropriately demonstrated factual circumstances, reinstatement of Petitioner's state due process of law rights?

III. Given the fact that "[i]t is as much the duty of government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals," (President Abraham Lincoln, Annual Address to Congress, December 3, 1861), is it violation of a citizen's state and federal constitutional due process of law rights and the citizen's state constitutional petition for redress of grievances right for a state court of last resort, on a Petition for Review of the Court of Appeal order, to not overturn for reason of abuse of judicial discretion the legally erroneous court of appeal order, and thereby restore Petitioner-Plaintiff's due process right of access to the courts?

LIST OF ALL PARTIES TO PROCEEDING
IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

1. Dennis Del Ponte, defendant

2. Law office of Zingheim, Vernon & Del Ponte, defendant

3. Noel Gassett, attorney of record

TABLE OF CONTENTS

Page

CONSTITUTIONAL QUESTIONS i

LIST OF ALL PARTIES TO PROCEEDING IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SIXTH APPELLATE DISTRICT. ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

CONSTITUTIONAL PROVISION CONFERRING JURISDICTION 1

PETITION FOR WRIT OF CERTIORARI 3

CONCLUSION 23

RULE 11 PARTY SIGNING DECLARATION 25

APPENDIX - Case Disposition Orders of the State Courts of California

TABLE OF AUTHORITIES

Page

Cases

Ackermann v. U. S. (Tex. 1950) 178 F.2d 983 2

Andrew Lazar v. The Superior Court of Los Angeles County (January 29, 1996) 12 Cal.4th 631 12

Bell v. City of Milwaukee, (Wis. 1984) 746 F.2d 1205 2

Brill v. Fox (1931) 211 Cal.739 9

Davis v. State Bar (1983) 33 Cal. 3d 231 14

Elmore v. Shell Oil Co. (1988) 733 F.Supp. 544 19

Feldesman v. McGovern (1941) 44 Cal. App. 2d 566 . 21

General Dynamics Corp. v. Superior Court, (1994) 7 Cal.4th 1161 11

Gold v. State Bar (1989) 49 Cal. 3d 908 22

Herbert v. Lando, (1979) 441 U.S. 153 19

In re Marriage of Park (1980) 27 Cal. 3d 337 18

Los Angeles Airways v. Hughes Tool Co. (1979) 95 Cal.App.3d 1 ..... 3, 6

Page

McKinney v. County of Santa Clara
(1st Dist. 1980) (1984) 110 Cal.App.3d 787 19

Mitchell v. Superior Court (1984) 37 Cal.3d 268 19

Powers v. City of Richmond (May, 1995)
10 Cal. 4th 85 4

Seaman's Direct Buying Service, Inc. v.
Standard Oil Co. (1984) 36 Cal.3d 752 18

Constitutional Provisions

U.S. CONST. amend. XIV, §1 1

Calif. Const. Art. 1, §7(a) 1

Calif. Const. Art. 1, § 3 4

Statutes

All Writs Act, 28 U.S.C.A. § 1651(a) 2

Page

Other Authorities and References

Witkin California Procedure, "Attorneys," (1985) ... 4, 8

Blackstone's Commentaries on the Law, "The Rights of Persons" P. 182 23

Thomas Paine, Rights of Man, (The Heritage Press, 1961) P.38 23

Hertz, Lincoln Talks, A Biography in Anecdote, (Blue Ribbon Books, 1941) P. 544 24

CONSTITUTIONAL PROVISION CONFERRING JURISDICTION TO REVIEW ON A WRIT OF CERTIORARI THE ORDER OF THE CALIFORNIA SUPREME COURT

To the Honorable Chief Justice of the United States Supreme Court and the Associate Justices of the United States Supreme Court:

David Lockmiller, appellant and petitioner, respectfully petitions for writ of certiorari following the decision of the Court of Appeal, Sixth Appellate District, filed on January 16, 1996, and the decision of the California Supreme Court, filed on March 20, 1996.

Petitioner-Plaintiff seeks review by the United States Supreme Court of the California Supreme Court order on the basis of citizen protection granted by the 14th Amendment to the United States Constitution. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S. CONST. amend. XIV, §1.) The corresponding California State Constitutional provision reads as follows: "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . . ." (Calif. Const. Art. 1, §7(a))

The basis of this petition relies on the following two federal case law precedents legally defining the meaning of this U. S. Constitutional provision. 1) "The right of appeal from such a [merely erroneous] judgment is no part of due process. [But] [t]he right of a litigant to a trial in accordance with the forms of law, and with an opportunity to present his claim or defense, if he desires to do so, is a vital part of due process." Ackermann v. U. S. (Tex. 1950) 178 F.2d 983, 985, affirmed 71 S.Ct. 209, 340 U.S. 193, 95 L.Ed. 207, followed in 179 F.2d 236, certiorari granted 70 S.Ct. 996, 997, 339 U.S. 962, 94 L.Ed. 1371 (alterations in original). 2) "The Fourteenth Amendment confers the right to a fair opportunity to present a claim . . . [that] has 'a reasonable basis in fact or law' . . .; therefore, they are entitled to judicial access that is 'adequate, effective, and meaningful.'" Bell v. City of Milwaukee, (Wis. 1984) 746 F.2d 1205, 1263 (alterations in original) (citations omitted).

This Petition for Writ of Certiorari has not been prepared, or assisted therein, by an attorney authorized by this United States Supreme Court to submit such a petition and petitioner does not qualify to file in forma pauperis. Petitioner did not even attempt to retain the services of an attorney. After a year of supremely diligent efforts to retain an appellate attorney to present his Petition for Writ of Error Coram Vobis to the California Appellate Court, all the efforts proved fruitless. Because of this prior experience, Petitioner did not even attempt to retain the services of a federal appellate law attorney.

In the alternative form, Petitioner asks this United States Supreme Court to consider this petition under provisions of the All Writs Act, 28 U.S.C.A. § 1651(a). The All Writs Act authorizes the Supreme Court and all courts established by act of Congress to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

PETITION FOR WRIT OF CERTIORARI

In a Petition of Review to the California Supreme Court, Petitioner-Plaintiff argued that the Appellate Court of the Sixth Judicial District abused its judicial discretion by ignoring and not applying established judicial policy and precedent that the "equitable considerations of fair hearing and penalizing fraud [are] compelling" when it has been factually established that fraud upon the trial court by a litigation opponent has prevented the trial of a claim. Los Angeles Airways v. Hughes Tool Co. (1979) 95 Cal.App.3d 1, 7; 156 Cal.Rptr. 805. In petition to the Sixth Appellate Court, Petitioner-Plaintiff cited three precedent cases of the Sixth Appellate Court itself which had cited this case in their own well-reasoned opinions as to whether to grant or deny a petition for Writ of Error Coram Vobis. These binding authority opinions and the demonstrated fact of fraud were ignored by the Sixth Appellate Court. The Petition for Writ of Error Coram Vobis was denied without explanation.
Petitioner-Plaintiff argued to the California Supreme Court that he had been denied by the Court of Appeal a fair opportunity to present a claim that had reasonable basis in both fact and law. Petition for Review of the Court of

Appeal order was denied subsequently by the California Supreme Court, again without explanation.

Petitioner-Plaintiff argues to this United States Supreme Court that neither petition could have been denied on the merits and therefore both petitions were denied either because Petitioner-Plaintiff was not represented by legal counsel or because he did not meet the requisite technical standards for presentation of his respective petitions of appeal. In fact, this was the argument made to the California Supreme Court.

"This case presents the following issues for review:

1) Article I, § 3 of the California State Constitution reads as follows: "The people have the right to . . . petition government for redress of grievances . . . ." "There is no constitutional right to appointment of counsel for the plaintiff or defendant in a civil proceeding, no matter what the nature of the case or the poverty of the party." Witkin California Procedure, "Attorneys," (1985) P. 77. Is it not a violation of Article I, § 3 of the California State Constitution for a Court of Appeal to hold a non-attorney citizen petitioner to the same technical standard of petition presentation as that of a licensed attorney specializing in appellate law?

2) "When writ review is the exclusive means of appellate review of a final order or judgment, an appellate court may not deny an apparently meritorious writ petition, timely presented in a formally and procedurally **sufficient** manner

. . . ." (emphasis added) Powers v. City of Richmond (May, 1995) 10 Cal. 4th 85, 114. When writ review is the exclusive means of appellate review of a final order or judgment, is it not abuse of judicial discretion for a Court of Appeal to reject a non-attorney citizen petition because it does not meet the same technical standard of petition presentation as that of one prepared by a licensed attorney specializing in appellate law?" (Petition for Review to California Supreme Court P. 8.)

The following "STATEMENT OF THE CASE" was made to the California Supreme Court as part of the "PETITION FOR REVIEW:"

"In February, 1988, Petitioner filed a legal malpractice complaint in the Superior Court for Santa Clara County. In October, 1988, Petitioner moved from the address provided in the original complaint and did not notify the court or the opposition party of the change in address. In April, 1991, legal counsel for Attorney-Defendant filed a "noticed" Motion for Discretionary Dismissal of Petitioner-Plaintiff's meritorious claim. Petitioner did not receive notice of the pending hearing and therefore did not attend.

In the uncontested hearing, Attorney-Defendant and his legal counsel, by fraudulent means, convinced the law and motion judge for the trial court to grant the specious motion. Attorney-Defendant's sworn bad faith denial of the existence of the contract for legal services regarding the "book manuscript" to be evaluated on Petitioner's behalf and the deliberate, knowing concealment from the court by Attorney-

Defendant's legal counsel of the relevant, substantial facts regarding Petitioner's pursuit of this lawsuit since it was filed were the means whereby these attorneys were able to convince the law and motion judge to grant the motion.

Following the non-adversary hearing of June 20, 1991 on the motion, Judge Reed Ambler, acting as law and motion judge for the trial court, signed the order of involuntary dismissal of Petitioner-Plaintiff's meritorious causes of action on the basis of "proof having been [sic] to the satisfaction of the court and good cause existing therefore." (trial court order of involuntary dismissal)

In his Petition for Writ of Error Coram Vobis, petitioner challenged that proof, consisting of attorney-defendant's sworn declaration of facts and his legal counsel's Memorandum of Points and Authorities in Support of the Motion for Discretionary Dismissal, as constituting fraud upon respondent court and absent Petitioner-Plaintiff. Fraud that has prevented the defrauded party from getting into court at all is extrinsic to the proceeding and is a basis for relief.

> [F]raud that prevented the trial of a claim or prevented the defrauded party from getting into court at all is extrinsic to the proceeding and is a basis for relief. Where there has been little or no judicial time invested in trial of a cause or an issue, the factor of judicial economy which otherwise weighs in favor of finality is less strong, and **the equitable**

considerations of fair hearing and penalizing fraud weigh more compelling. (emphasis added) Los Angeles Airways, Inc. v. Hughes Tool Co. (1979) 95 C.A. 3d 1, 156 Cal. Rptr. 805."

This case presented precisely the appropriate circumstances for the issuance of extraordinary relief and accordingly the writ of error coram vobis should have been issued by the Sixth District Court of Appeal. Ample credible evidence of the two instances of attorney perpetrated fraud upon respondent court was presented to the Six District Court of Appeal. The order from the Court of Appeal reads as follows: "The petition for writ of mandate is denied." It is unclear from the Court of Appeal written ruling, by reason of silence on the issue, whether the Petition was denied summarily on the merits or because the petition was not presented in a formally and procedurally sufficient manner." (Petition for Review P. 9 -11.)

Petitioner-Plaintiff made the following state constitutional argument to the California Supreme Court:

"Despite supremely diligent efforts to retain legal counsel specializing in appellate law to conform the petition to the rules of the court of appeal, Petitioner was unable to do so. To the Court of Appeal, Petitioner submitted a separate exhibit detailing his unsuccessful and perhaps futile efforts to retain competent legal counsel for the purpose of conforming his petition to the presentation rules of the Court of Appeal. For this petition to the California Supreme

Court, Petitioner has lodged letters he has written in the last year to the three appellate attorneys and the written response which was received from two of them.

Given the fact that there is no constitutional right to legal counsel in civil matters (Witkin California Procedure, "Attorneys" at 77), given the fact that every citizen has the right to petition the government for redress of grievances (California State Constitution Article I, § 3), and given the fact that some citizens with meritorious petitions may either be too poor or unable to persuade an attorney to conform the presentation of facts and issues of law in accordance with the California Rules of Court, should not there be some relaxation of the courts' rules of technical presentation so that these worthy citizens may be able to exercise effectively their constitutional right to petition the judicial branch of government?" (Petition for Review P. 11 -12)

"Clearly, every citizen's constitutional right to petition the government for redress of grievances must be placed on a different judicial plane, and deserves much the higher consideration, than that of court rules of administration intended to make the work of the judiciary more efficient. There must be judicial recognition and appropriate allowance for the difficulties a non-attorney petitioner faces in meeting the technical standards of petition presentation; the alternative is to permit the procedural rules of the courts to be used effectively and unconstitutionally to keep non-attorney petitioners with legitimate grievances out of the courts. Minor infractions of court administrative rules of petition presentation which may be easily remedied, or even

overlooked, and not culpably prejudicial to the other parties should not be considered as adequate basis for a Court of Appeal not to consider the citizen's petition on the merits. It may be in the interests of an overburdened court system to do so, but it is not in the interests of justice.

As to the second issue raised by Petitioner, the California Supreme Court in Brill v. Fox (1931) 211 Cal.739, 743, 297 P. 25 settled this issue which was before the Sixth District Court of Appeal in the present case a very long time ago:

> "The legal principles underlying the granting of motions to set aside defaults are comparatively simple, and have been frequently announced by this court. The question is primarily one within the discretion of the trial court, but this discretion is not capricious or arbitrary, but is an impartial discretion guided and controlled in exercise by fixed legal principles.
>
> 'It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.' (citations omitted) It is also well settled that **it is the policy of the law to bring about a trial on the merits wherever possible, so that any doubts which may exist should be**

> **resolved in favor of the application, to the end of securing a trial upon the merits.** (citations omitted) Although it is true that the courts of appeal have shown great reluctance in cases of this kind to disturb the order of the trial court, it is equally true that denials of such relief by the trial court are scanned more carefully than cases where the trial court has granted the relief, to the end that wherever possible cases may be heard on their merits. (citations omitted) (emphasis added)"
> (Petition for Review P. 13 - 15)

In the instant case, Petitioner-Plaintiff has alleged and proven in petition to the state's appellate judiciary that his state and federal constitutional rights to due process of law in a legal malpractice lawsuit were terminated involuntarily and prematurely as an immediate, direct result of fraud perpetrated upon the law and motion judge for the trial court by Attorney-Defendant. In Plaintiff-Petitioner's absence, the meritorious legal malpractice lawsuit was dismissed by order of the court on the basis of fraud perpetrated upon the law and motion judge. Following discovery that his due process of law rights had been terminated illegally in such a manner, a subsequent civil appeal, by means of extraordinary writ, had to be made to reinstate Plaintiff-Petitioner's due process right of access to the courts.

Petitioner-Plaintiff contends to this United States Supreme Court that both his Petition for Writ of Error

Coram Vobis to California's Sixth District Court of Appeal and his Petition for Review to the California Supreme Court were denied, not on the merits, but rather because Petitioner-Plaintiff was not represented by legal counsel. Although it may be in the interests of a time-pressed state court system to keep petitioners not represented by attorneys out of the courts of appeal in this manner, it is not necessarily in the interests of justice and fair play. It is also a violation of Petitioner-Plaintiff's state and federal constitution rights to due process of law and state constitutional right to petition the government for redress of grievances.

In General Dynamics Corp. v. Superior Court, (1994) 7 Cal.4th 1161, 1181; 32 Cal.Rptr.2d 1; 876 P.2d 487 the unanimous California Supreme Court declared that "an attorney's highest duty is to the welfare and interest of the client." Petitioner-Plaintiff presented in petition form to the Sixth District Court of Appeal prima facie evidence of three separate and distinct frauds perpetrated upon his client, Petitioner-Plaintiff, by Attorney-Defendant. The successive attorney frauds first foreclosed Plaintiff-Petitioner's causes of action against his former employer and then foreclosed his right to pursue the only avenue to justice remaining to him, i.e. a legal malpractice lawsuit.

It is unimaginable and incomprehensible to Petitioner-Plaintiff as to what judicial doctrine or policy, constitutional provision, legislated statute, case law precedent or administrative rule of the court, either the state court of appeal or state Supreme Court considered to be more

important than punishing these ethics violations of an attorney upon his client. Petitioner-Plaintiff has been left in dumbfounded wonderment as to what the California Supreme Court and the Sixth District Court of Appeal might consider to be a serious violation of an "attorney's highest duty."

Both state courts of appeal failed to give any reason for denial of Petitioner's respective petitions. The Sixth District Court of Appeal stated in entirety: "The petition for writ of mandate is denied." The California Supreme stated in entirety: "Petition for review DENIED."

In the third and final fraud perpetrated by Attorney-Defendant upon his client, Petitioner-Plaintiff, the law and motion judge for the trial court gained ersatz standing as the object of the intent to defraud or induce reliance.

> "The elements of fraud which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, §676, p. 778; see also Civ. Code § 1709." Andrew Lazar v. The Superior Court of Los Angeles County (January 29, 1996) 12 Cal.4th 631, 638.

Plaintiff-Petitioner had written a book manuscript about being falsely accused of sexual harassment by an employee whom he supervised and included, in chronological order, the events that led up to the false allegations, the company's investigation into these false allegations and the results thereof, Plaintiff-Petitioner's initial legal consultation with Attorney-Defendant, Plaintiff-Petitioner's subsequent forced resignation and his internal administrative appeal therefrom without the benefit of legal counsel, and Plaintiff-Petitioner's futile and fruitless efforts for a year thereafter to gain employment.

Plaintiff-Petitioner retained Attorney-Defendant to do a legal evaluation of the book manuscript in order to determine if any of Plaintiff-Petitioner's legal rights had been violated. As a result of the law and motion judge's reliance upon the sworn testimony of Attorney-Defendant that there had never been a contract for legal services between the litigating parties, Petitioner-Plaintiff's meritorious legal malpractice lawsuit was dismissed involuntarily by order of the trial court.

Moreover, the law and motion judge for the trial court was made an unwitting accomplice to fraud in a civil judicial proceeding. Attorney-Defendant had willfully failed to perform legal services for his client, Plaintiff-Petitioner, and then willfully deceived the court. Although no damage attached to the unwitting judge, Petitioner-Plaintiff's state and federal constitutional guarantees to due process of law were immediately terminated by order of the court.

In an attempt to invoke the equitable powers of both state courts of appeal, Petitioner included a lengthy citation from a California Supreme Court opinion that was directly on point:

> "In the past we have recognized that the filing of false or misleading pleadings or documents is ground for discipline. In Pickering v. State Bar (1944) 24 Cal. 2d 141, 144, [148 P.2d 1], we held that 'The presentation to a court of a fact known to be false presumes an intent to secure a determination based upon it and is a clear violation of [§ 6068] (See also Olquin v. State Bar (1980) 28 Cal.3d 195, 199-200 [167 Cal.Rptr. 876, 616 P.2d 858]) . . . ."
>
> "Petitioner urges that his misrepresentation does not warrant discipline because it was unlikely to mislead the court or injure [Plaintiff]. This contention lacks merit. Actual deception is not necessary to prove wilful deception of a court; it is sufficient that the attorney knowingly presents a false statement which tends to mislead the court. (Pickering v. State Bar, supra, 24 Cal.2d at pp. 144-145.) Moreover, petitioner's false statement, **IF BELIEVED**, would have had a substantial effect upon [Plaintiff], whose [damages] were at stake."

> **"The willful failure to perform legal services for which an attorney has been retained** (Finch v. State Bar (1981) 28 Cal.3d 659,665 [170 Cal. Rptr. 629, 621 P.2d 253]) **and the willful deceiving of a court** (Pickering v. State Bar, supra, 24 Cal. 2d at pp. 144-145) **each warrant a separate and independent disciplinary response. When both offenses are committed in concert, substantial discipline is warranted."** Davis v. State Bar (1983) 33 Cal. 3d 231,240; 655 P.2d 1276 (emphasis added).

Unfortunately, for Petitioner-Plaintiff in the present case, the law and motion judge for the trial court **DID BELIEVE** Attorney-Defendant's perjured representation that Petitioner-Plaintiff was never his client." (Petition for Review P. 26 -27)

On the issue of comparative credibility, Petitioner-Plaintiff wrote the following to both the Court of Appeal and the California Supreme Court:

"In summary for this court on the issue of credibility, either Petitioner-Plaintiff now is committing perjury in his sworn verification accompanying this Petition for Writ of Error Coram Vobis or Attorney-Defendant committed perjury in his sworn statement accompanying the successful motion for involuntary dismissal of this case in 1991. Is Petitioner-Plaintiff now perpetrating this massive, complex fraud upon this Court of Appeal and Attorney-Defendant

with the purpose and intent of obtaining illegal financial gain by means of an "unmeritorious" malpractice lawsuit? Or, did Attorney-Defendant willfully and intentionally conceal from the court in 1991 the truth as to the existence of the contract for legal services between the litigating parties in an effort to escape any and all liability for his legal malpractice? The truth or falsity of the conflicting evidence must be determined by this Court of Appeal in deciding the issue.

At the time of the uncontested hearing on the motion to dismiss involuntarily this case in 1991, the law and motion judge for the trial court accepted as being true the uncontested, perjured testimony of attorney-defendant. According to the public record of this case, even though Attorney-Defendant's sworn statement conflicted wholly with the allegations made in the malpractice complaint and was in substantial variance with his own legal counsel's original answer to the complaint, the law and motion judge did not ask a single question at the uncontested hearing on the motion in 1991. The law and motion judge did not question Attorney-Defendant regarding either the nature of the materials read or the nature and substance of the subsequent comments admittedly made by Attorney-Defendant to Plaintiff-Petitioner in exchange for the $300.

The conflict of evidence in this case logically leads to the one critical question: Why would Plaintiff-Petitioner pay Attorney-Defendant $300 to hear Attorney-Defendant's comments of a strictly "non-legal" (i.e."he was never my client") nature regarding Plaintiff-Petitioner's book

manuscript? If an author has to pay each reader $300 to read his book, it would not be a profitable enterprise.

And this Court of Appeal might also question why Attorney-Defendant and his legal counsel waited? Why did they wait until the uncontested hearing on their motion for involuntary dismissal of Plaintiff's malpractice lawsuit before claiming "He (Plaintiff) was never my client." Why was this "true" fact not the answer made by Attorney-Defendant's legal counsel to the original legal malpractice complaint? Wouldn't it have been better to end this "unmeritorious" legal malpractice lawsuit sooner rather than later?

The truth is that the law and motion judge, and therefore the respondent court, was cheated out of the truth by Attorney-Defendant and his legal counsel in 1991 regarding the contractual relationship between the litigating parties and Plaintiff-Petitioner's efforts to pursue this lawsuit since it was filed. On the basis of false, misleading, and perjured testimony, the law and motion judge granted the motion of involuntary case dismissal of Plaintiff's case. These frauds perpetrated upon the court and absent plaintiff has deprived Plaintiff-Petitioner of an opportunity to litigate his case and therefore constitutes extrinsic fraud meriting the equitable relief of this court and the imposition of appropriate and severe judicial sanctions upon the offending attorneys.

Attorney-Defendant's sworn bad faith denial of the contract to perform legal services is itself an additional cause of legal action. "A contracting party should not be able to

deny the existence of a valid contract in order to shield itself from liability for breach of that contract. **Today, the court holds that an action will lie in tort against such conduct.**" Chief Justice of the California Supreme Court Rose Bird separate, concurring opinion in Seaman's Direct Buying Service, Inc. v. Standard Oil Co. (1984) 36 Cal.3d 752, 774-775, 206 Cal.Rptr. 354, 686 P.2d 1158." (Petition for Review P. 27 - 30.)

As to the level of evidence necessary to sustain, within legal discretion, a meritorious petition for writ of error coram vobis, the California Supreme Court has declared:

> "[Appellant] does not have to demonstrate with certainty that a different result would obtain on retrial. Rather, [Appellant] must show facts indicating a sufficiently meritorious claim to entitle her to a fair adversary hearing. (Olivera v. Grace, supra 19 Cal.2d at p. 579; see also Bennett v. Hibernia Bank (1956) 47 Cal.2d 540 [305 P.2d 20].)" In re Marriage of Park (1980) 27 Cal. 3d 337, 346; 165 Cal. Rptr. 792; 612 P. 2d 882.

Petitioner-Plaintiff had been an employee of Advanced Micro Devices for almost five years, when as a direct consequence of being falsely accused of sexual harassment, he was forced to resign his position of employment. To a prospective employer, what are the explanatory choices available to someone who has been falsely accused of sexual harassment and subsequently forced

to resign his or her position of employment? What is the acceptable alternative to telling the truth?

The court in Elmore v. Shell Oil Co. (1988) 733 F.Supp. 544, 546, was able to reason to the correct legal conclusion:

> Plaintiff's ability to fabricate a story to prospective employers about the circumstances surrounding his discharge is simply not a viable alternative. See Lewis. Since plaintiff was in the employ of [his former employer] for a substantial period, he was compelled to repeat the alleged slander to explain his sudden departure. Accordingly, I find that plaintiff has stated a claim for defamation.

See also McKinney v. County of Santa Clara (1st Dist.1980) 110 Cal.App.3d 787, 796, 168 Cal.Rptr. 89, 93-94, which is declarative of California law and cited in Elmore.

The California Supreme Court itself has addressed the subject of false accusations of wrongdoing. In Mitchell v. Superior Court 37 Cal.3d 268, 283; 208 Cal.Rptr. 152, 690 P.2d 625 [Nov. 1984], the unanimous California Supreme Court stated: "There is very little public interest in protecting the source of false accusations of wrongdoing." And the Mitchell California Supreme Court also quoted from a United States Supreme Court opinion as follows: "Herbert v. Lando, (1979) 441 U.S. 153, 169 reminds us that the individual's interest in his reputation is also a basic concern"

Id. at 275. Petitioner-Plaintiff was unemployed in his chosen profession for four years as a result of false allegations of sexual harassment.

Plaintiff-Petitioner did not learn of the fraud upon the law and motion judge for the trial court until over a year after it occurred. Following four successive night class courses of paralegal training at the University of San Francisco, in which Petitioner-Plaintiff studied Civil Procedure Before Trial and Legal Research and Writing, Petitioner-Plaintiff solely prepared and properly served a Deposition Subpena upon his former employer. On the date of the scheduled Deposition, Petitioner-Plaintiff received a letter from an attorney with the law firm of Schachter, Kristoff, Orenstein & Berkowitz which reads in pertinent part as follows:

> "This firm represents Advanced Micro Devices. We are in receipt of a Deposition Subpena and Notice of Deposition in the above referenced action directed to Advanced Micro Devices, a non-party. We understand the above-referenced lawsuit has been dismissed by the court. . . . Consequently, the documents served on my client seeking information pursuant to that lawsuit are improper and have no force or effect. AMD will not be responding to the subpena or attending the deposition as noticed.

Petitioner-Plaintiff did not actually receive the letter until the end of the day. First, Petitioner-Plaintiff attended the scheduled, but otherwise unattended, deposition and read into the record several questions to the first two anticipated witnesses, the company lawyer that did the investigation into the false allegations and the Human Resources Vice President with whom Plaintiff-Petitioner had several communications. The court reporter transcribed questions were submitted as a separate exhibit to the Sixth District Court of Appeal. But for the fraud perpetrated by Attorney-Defendant upon the law and motion judge for the trial court and absent Petitioner-Plaintiff, the available information sought pursuant to the legal malpractice lawsuit would have been provided by Advanced Micro Devices at that time.

Petitioner-Plaintiff made arguments in vain to both the Sixth District Court of Appeal and the California Supreme Court that extrinsic fraud in a judicial proceeding by an Attorney-Defendant in a legal malpractice lawsuit should not be rewarded.

"On the issue of laches, if the evidence of the actual testimony from the several women interviewed by the employer regarding the sexual harassment allegations is now lost due to Attorney-Defendant's professional misconduct and the passage of time, the memories of the women interviewed shall have to be sufficient to uphold Plaintiff-Petitioner's claims of employer misconduct. Plaintiff-Petitioner will lose on the merits in this malpractice action if Plaintiff-Petitioner cannot show that he would have received

a favorable judgment in the underlying employment law case. Feldesman v. McGovern 44 Cal. App. 2d 566, 568.

In 1986, in order to avoid any and all liability for his legal malpractice in 1984, Attorney-Defendant fraudulently led his client Plaintiff-Petitioner to believe that the legal evaluation of the book manuscript had been done and Attorney-Defendant had concluded that none of Plaintiff-Petitioner's legal rights had been violated by anyone. This calculated fraud, this deception which prevented knowledge of Plaintiff's rights, was committed by Attorney-Defendant in order that Plaintiff-Petitioner would not seek out the opinion of competent legal counsel regarding the book manuscript and thereby discover Attorney-Defendant's legal malpractice for which Attorney-Defendant would be held financially liable by the courts. Attorney-Defendant fraudulently pretended to represent Plaintiff-Petitioner but in reality was conniving at Plaintiff-Petitioner's defeat.

"Honesty is one of the most fundamental rules of ethics for attorneys, and an attorney who intentionally deceives his client is culpable of an act of moral turpitude. Consequently, because the ends of attorney discipline are remedial and not punitive, an act of dishonesty toward a client warrants actual suspension or disbarment from the practice of law even if no harm results to the client." Gold v. State Bar (1989) 49 Cal. 3d 908, 914, 264 Cal. Rptr. 125, 782 P.2d 264. (emphasis added)

As a consequence of Attorney-Defendant's fraudulent concealment from Plaintiff-Petitioner in 1986 of

Plaintiff-Petitioner's causes of action against his former employer, all evidence then available as to the underlying case in this malpractice action was put at risk of being lost forever. Attorney-Defendant should be equitably estopped from pleading now before this court that the issue of laches should apply. For as Justice Blackstone has stated: "It is a rule that no man shall take advantage of his own wrong." (Blackstone's Commentaries on the Law, "The Rights of Persons" P. 182)" (Petition for Review P. 30 - 32)

CONCLUSION

All that Plaintiff-Petitioner has ever asked for is a hearing on the merits of the original legal malpractice complaint. Petitioner ended his Petition of Review to the California Supreme Court in the following manner (Petition for Review P. 32.):

> "A man, by natural right, has a right to judge in his own cause; and so far as the right of the mind is concerned, he never surrenders it. But what availeth it him to judge, if he has not the power to redress? He therefore deposits this right in the common stock of society, and takes the arm of society, of which he is a part, in preference and in addition to his own. Society *grants* him nothing. Every man is a proprietor in society, and draws on the capital as a matter of right." Thomas Paine, Rights of Man, (The Heritage Press, 1961) P.38.

For the reasons stated, this petition for review should be granted, and this cause should be set for argument."

Petitioner chooses to end this Petition for Justice to the United States Supreme Court with a favorite and important Lincoln story about justice owing to one falsely accused and the men and women in government controlling the power of justice.

> Senator J. F. Wilson, in pleading the cause of a soldier wrongfully accused of desertion, and finding the Secretary of War inexorable, "appealed to Caesar," and procured an overriding order from the President which Stanton finally obeyed. When the result was reported to Mr. Lincoln, he said:
>
> "Well, I am glad you stuck to it, and that it ended as it did; for I meant it should so end, though I had to give it personal attention. A private soldier has as much right to justice as a major-general." (as told by Sen. James F. Wilson in Hertz, Lincoln Talks, A Biography in Anecdote, (Blue Ribbon Books, 1941) P. 544.)

For the reasons stated, this petition for justice should be granted, and this cause should be set for argument.

Respectfully submitted,
By David Lockmiller
in Pro Per

RULE 11
PARTY SIGNING DECLARATION

I, David Lockmiller, Petitioner and Plaintiff, to the best of my knowledge, information, and belief, formed after reasonable inquiry, do swear that this petition is not presented for any improper purpose, such as harassment, is supported by the existing law, contains allegations that have evidentiary support, and contains denials of factual contentions that have evidentiary support.

David Lockmiller

David Lockmiller

Noel B. Gassett
James J. Slone
Gassett, Perry & Frank
Attorneys at Law
210 North Fourth Street, Suite 400
San Jose, CA 95112
Telephone (408) 295-7034

Superior Court
FILED
June 25, 1991
Robert Wandruff Clerk
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA CLARA

DAVID LOCKMILLER, Plaintiff, vs. DENNIS DEL PONTE, LAW OFFICES OF ZINGHEIM, VERNON & DEL PONTE, Defendants.	)	NO. 648604 ORDER DISMISSING PLAINTIFF'S ACTION

ORDER DISMISSING PLAINTIFF'S ACTION

The motion of Defendants, DENNIS DEL PONTE, and LAW OFFICES OF ZINGHEIM, VERNON & DEL PONTE, for an Order dismissing the above-entitled action, due to Plaintiff's failure to prosecute and bring this case to trial within three years after the action was commenced against Defendants, came on regularly for hearing on June

20, 1991 in Department 2 of the above-entitled Court, the Honorable Reed Ambler presiding.

Proof having been [sic] to the satisfaction of the Court, and good cause existing therefore,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss the above-entitled action due to Plaintiff's failure to prosecute, and bring the action to trial within three years after the action was commenced against Defendants, is granted, and the above-entitled action is hereby dismissed.

DATED: June 20, 1991

By: /s/ REED AMBLER
HONORABLE REED AMBLER
Judge of the Superior Court

FILED
Jan. 16, 1996
Court of Appeal
Sixth App. Dist.
Michael J. Yerly, Clerk

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

DAVID LOCKMILLER,
Petitioner,

No. H014796
Super. Crt.
No. 648604

vs.

THE SUPERIOR COURT
OF SANTA CLARA COUNTY,

Respondent.

DENNIS DEL PONTE, et al.,
Real Parties in Interest.
_____/

BY THE COURT:

The petition for writ of mandate is denied.

(Premo, Acting P.J., Elia, J., and Mihara, J., participated in this decision.)

Dated: Jan. 16, 1996 PREMO, Acting P.J.

SUPREME COURT
FILED
Mar. 20, 1996
Robert Wandruff Clerk
Deputy

Sixth Appellate District No. H014796
SO51466

IN THE SUPREME COURT OF CALIFORNIA

DAVID LOCKMILLER,
Petitioner,

v.

SUPERIOR COURT OF
SANTA CLARA COUNTY,

Respondent.

DENNIS DEL PONTE, et al.,
Real Parties in Interest.

Petition for review DENIED.

MOSK
Acting Chief Justice

Supreme Court, U.S.
FILED
SEP 11 1996
CLERK

No. 96-237

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

DAVID LOCKMILLER,

Petitioner,

v.

SUPERIOR COURT, SANTA CLARA COUNTY,

Respondent.

Petition for Writ of Certiorari
to the California Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NOEL B. GASSETT
GASSETT, PERRY & FRANK
210 North Fourth Street, Suite 400
San Jose, California 95112
(408) 295-7034
Attorneys for Real Parties In Interest
Dennis Del Ponte and Law Offices of
Zingheim, Vernon & Del Ponte

TABLE OF CONTENTS

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY 1

II. PETITIONER'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED 3

TABLE OF AUTHORITIES

California Code of Civil Procedure
§ 583.410 1

California Code of Civil Procedure
§ 583.420 1

California Rules of Court 29(a) 3

28 U.S.C. § 1257 4

To the Honorable Chief Justice and the Associate Justices of the United States Supreme Court:

Real Parties In Interest Dennis Del Ponte and the Law Offices of Zingheim, Vernon & Del Ponte respectfully request that this Court deny Petitioner's petition for writ of certiorari following the decision of the California Court of Appeal, Sixth Appellate District filed on January 16, 1996 and the decision of the California Supreme Court, filed on March 20, 1996.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

On February 3, 1988, Petitioner filed his original complaint, in propria persona, alleging legal malpractice against Real Parties In Interest Dennis Del Ponte and the Law Office of Zingheim, Vernon & Del Ponte. The complaint pertained to incidents dating back to November 1983. Real Parties In Interest answered the complaint on March 2, 1988. Although Petitioner claims to have had two conversations with an unidentified insurance representative regarding settlement in March 1988, and although Petitioner claims to have retained an expert at that time, Petitioner took no further steps to prosecute his legal malpractice action for more than three years and it appeared that Petitioner had abandoned this case. Thereafter, Real Parties In Interest brought a motion to dismiss under California Code of Civil Procedure §§ 583.410 and 583.420 for Petitioner's failure to prosecute and for Petitioner's failure to bring the case to trial within three years. Petitioner did not contest or otherwise respond to the motion. On June 20, 1991, nearly three and one-half years after Petitioner commenced this

lawsuit, the California Superior Court heard and granted the motion to dismiss.

In December 1995, over four and one-half years after the case had been dismissed, and long after the time for bringing an appeal had elapsed, Petitioner filed a petition for writ of error coram vobis in the California Court of Appeal, Sixth Appellate District. Notwithstanding the basis for the Superior Court's dismissal, i.e., Petitioner's inexcusable dilatory conduct, the petition to the Court of Appeal pertained primarily to the supposed merits of Petitioner's lawsuit and Petitioner's inability to locate an attorney to represent him. In addition, the petition contained numerous conclusionary, inflammatory, and unsupported allegations to the effect that the Real Parties In Interest had committed extrinsic fraud on the Superior Court. The petition did not pose any federal issues. On January 16, 1996, the Court of Appeal issued the following decision: "The petition for writ of mandate is denied." At no time did the Court of Appeal suggest that any federal question formed the basis for its denial of the petition. Moreover, at no time did the Court of Appeal provide any further explanation for its ruling.

Thereafter, Petitioner filed a petition for review by the California Supreme Court, arguing for the first time that his rights as set forth in the Constitution of the State of California were violated because he assumed that the Court of Appeal was holding his brief to the same "technical rules" as those applicable to briefs filed by licensed attorneys specializing in appellate practice. Notwithstanding Petitioner's speculation as to the basis for

the writ denial, the record is devoid of any evidence suggesting that the Court of Appeal denied Petitioner's petition on the basis of its nonconformity with any "technical rules." More importantly, Petitioner's petition for review failed to present any issue appropriate for review by the California Supreme Court in that the petition did not address any unsettled important questions of law within the meaning of California Rules of Court 29(a). On March 20, 1996, the California Supreme Court issued the following decision: "Petition for review DENIED." Like the Court of Appeal, the California Supreme Court did not provide any further explanation or insight as to the basis for its decision.

II. PETITIONER'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Review by this Court is neither necessary nor appropriate. Notwithstanding Petitioner's arguments, the issues posed by this action do not satisfy this Court's jurisdictional requirements. Moreover, the petition fails to present any compelling reasons sufficient to justify consideration by this Court. Furthermore, the decisions from which Petitioner seeks relief should not be set aside.

Petitioner fails to identify any statutory provision conferring jurisdiction on this Court to review the decisions filed earlier this year by the California Court of Appeal, Sixth Appellate District and the California Supreme Court. However, assuming that Petitioner intended to seek jurisdiction under 28 U.S.C. § 1257, Petitioner's petition should be denied. Simply stated, this action does not meet

the jurisdictional requirements because it does not raise any issue as to the validity of any federal or state statute. Likewise, this action does not present a Constitutional or other claim of title, right, privilege, or immunity within the meaning of 28 U.S.C. § 1257. In this regard, the Constitutional questions identified by Petitioner have no connection to the facts or procedural history of this action and have never formed the basis for any decision by any Court during the course of this litigation.

Furthermore, Petitioner's arguments are without merit because they are based upon wholly inaccurate assumptions as to the rationale for the decisions rendered by the California Court of Appeal and by the California Supreme Court in this action. Contrary to what Petitioner would have this Court believe, there is no evidence that either the California Court of Appeal or the California Supreme Court denied Petitioner's petitions because Petitioner was not represented by legal counsel. There is also no evidence that either the California Court of Appeal or the California Supreme Court refused to apply binding authority when considering Petitioner's briefs. In fact, because Petitioner cannot make an affirmative showing to the effect that he had good cause for his delay in prosecuting his action, there is no authority that would mandate review or reversal of the California Superior Court's judgment of dismissal for Petitioner's failure to prosecute -- regardless of whether the appellate decisions were premised upon Petitioner's failure to comply with the rules of appellate practice.

Petitioner's failure to present with accuracy, brevity,

and clearness the facts essential to a ready and adequate understanding of the points requiring consideration in this action provides yet additional justification for this Court to deny the petition for writ of certiorari. Consequently, and for all of the reasons set forth above, Real Parties In Interest respectfully request that this Court deny Petitioner's petition for writ of certiorari.

Respectfully submitted,

NOEL B. GASSETT
DIANE E. BAYLOR
GASSETT, PERRY & FRANK
210 North Fourth Street, Suite 400
San Jose, California 95112
(408) 295-7034
Attorneys for Real Parties In Interest
Dennis Del Ponte and Law Offices of
Zingheim, Vernon & Del Ponte

Supreme Court, U.S.
FILED
SEP 23 1996
CLERK

(3)

No. 96-237

In The

Supreme Court of the United States

October Term, 1995

DAVID LOCKMILLER,

Petitioner,

v.

SUPERIOR COURT OF SANTA CLARA COUNTY,

Respondent.

To The Court Of Appeal Of The State Of California
Sixth Appellate District

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID LOCKMILLER
In Pro Per
1552 Redwood Highway
Corte Madera, CA 94925
(415) 924-0550

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF ADDRESSED TO NEW POINTS RAISED IN THE BRIEF IN OPPOSITION

Point I 1

Point II 8

FINAL COMMENTS 10

TABLE OF AUTHORITIES

Page

CASES

In re Marriage of Modnick, 33 Cal. 3d 897 (1983) 9

In re Marriage of Park, 27 Cal. 3d 337 (1980).....4, 5

Neubrand v. Superior Court, 9 Cal. App. 3d 31 (1970) 9

RULES

Rule of the Supreme Court of the United States 33 10

POINT IN OPPOSITION #1.

"Although Petitioner claims to have had two conversations with an unidentified insurance representative regarding settlement in March 1988, and although Petitioner claims to have retained an expert at the time, Petitioner took no further steps to prosecute this legal malpractice action for more than three years and it appeared that Petitioner had abandoned this case." (Brief in Opposition to Petition for Writ of Certiorari – Page 1.)

REPLY TO POINT IN OPPOSITION #1.

As counsel of record for the real parties in interest at the Superior Court of Santa Clara County, the Sixth District Court of Appeal, the California Supreme Court, and the U. S. Supreme Court, Mr. Noel B. Gassett must have been aware of the following argument and referenced evidence which was presented to the Sixth District Court of Appeal in the Petition for Writ of Error Coram Vobis:

> On March 3, 1988 and again on March 17, 1988, I was contacted by telephone by man claiming to be an insurance adjustor agent of defendant-attorney's malpractice insurance carrier, working for Weil & Company in Oakland. **His claim that he was an insurance adjustor is the reason that I spoke to the man; as an insurance adjustor, presumably he had the authority to fashion an out-of-court settlement.** I informed the opposition's agent that since filing the legal malpractice action, I personally had located and retained already an expert witness in employment law to evaluate my case and that I was not willing to settle the case at "10 cents on the dollar."
>
> In the first telephone conversation on March 3, 1988, I initially agreed to meet directly with the agent at my apartment on the following Tuesday to discuss my case. After considering myself the advisability of such a meeting, I canceled it the

next morning by calling the number given to me by the agent and leaving a message to that effect since he was not in the office at that time.

In the second telephone conversation of March 17, 1988, to the opposition agent's request that I provide a copy of the book manuscript referred to in the complaint, I asked the agent why he did to get a copy of the book manuscript from A-D. According to the agent, attorney-defendant had claimed to the malpractice insurance carrier to have either misplaced the "book manuscript" or returned it to Plaintiff. To the agent's repeated request for a copy of the book manuscript. I responded that I was willing to do so on the condition that my legal counsel approved. At a scheduled meeting with my expert witness in March, 1988 to discuss his initial evaluation of my book manuscript, I specifically asked him how I should respond to the request. My legal counsel did not approve of the opposition proposal. I notified the agent of attorney-defendant's malpractice insurance carrier personally by telephone within a few days of the legal counsel that I had received from my expert witness and intended to follow." (See Exhibit U for a copy of Plaintiff-Petition's phone bill indicating the phone calls placed to the opposition agent.)

As proof that the meeting with his expert witness took place on March 29, 1988, I have provided a copy of a cash receipt acknowledging payment to my expert witness on that day. Further evidence of my active pursuit of this lawsuit is my March 31 dated letter to my expert witness suggesting specific employer publications that should be sought. (See Exhibit V for a copy of the cash receipt and my letter.)

(Petition for Writ of Error Coram Vobis pages 22 - 23)

In Exhibit U, accompanying the petition to the appellate court, the opposition's agent was identified specifically as Rayford Reed (spelled phonetically). For opposition legal counsel to now describe opposition's own agent to the members of the U. S. Supreme Court as "unidentified" is, at best, disingenuous.

Petitioner, in the Petition for Writ of Error Coram Vobis to the Sixth District Court of Appeal, challenged the misconduct of the opposition's legal counsel at the uncontested hearing before the law and motion judge on the motion to dismiss:

> It should be presumed by this court of appeal that the "right hand of defendant," his legal counsel, must know what the "Left hand of defendant," his malpractice insurance carrier, is seeking. And any information gathered by that "left hand" naturally must be presumed to fall into the "right hand." Or, stated more concretely and to the point, this Court should presume that the information gathered by the paralegal agent of the legal malpractice insurance carrier in direct telephone conversation with Plaintiff-Petitioner following the filing of the malpractice complaint must have been communicated to the defendant and his legal counsel. Thus, the factual representation by both Attorney-Defendant and his legal counsel to the law and motion judge that "Plaintiff has done absolutely nothing with this case since serving this Compalint" was known by them to be false.
>
> However, both Attorney-Defendant and his legal counsel purposely violated their legal duties as officer's of the court to permit and enable the law and motion judge to decide the issue of involuntary case dismissal in a fair and just manner. In the non-adversary hearing on the motion to dismiss involuntarily this case, both attorney-defendant and his legal counsel

> knew that their false statements concealed from the court the truly relevant and substantial facts on this issue before the court. And most importantly, these attorneys knew that their false statements, if believed, would be misleading to the Court in weighing its decision on whether or not to grant the order of involuntary dismissal of Plaintiff's case in Plaintiff-Petitioner's absence.
>
> Knowledge by the law and motion judge for the trial court of 1) Plaintiff-Petitioner's personal selection and hiring of an expert witness within two months of filing this legal malpractice lawsuit, 2) Plaintiff-Petitioner's stated willingness to the opposition to negotiate a settlement at more than "10 cents on the dollar," and 3) Plaintiff's stated willingness and demonstrated eagerness to engage in discovery proceedings might have resulted in postponement of the Court's decision on the Motion for Discretionary Dismissal until Plaintiff could be heard. This, of course, is a determinative test of what the unanimous California Supreme Court cited and considered to constitute extrinsic fraud in *In re Marriage of Park*, supra, 342.: "The concealment of facts which, if revealed to the trial court, might result in the postponement of an adjudication until the absent party can be heard constitutes extrinsic fraud.

(Petition for Writ of Error Coram Vobis pages 44 - 46)

The complete quotation from the California Supreme Court in *Park*, referenced in the immediately proceeding paragraph, is as follows:

> A final judgment may be set aside by a court if it has been established that extrinsic factors have prevented one party to the litigation from presenting his or her case. (*Oliver v. Grace* (1942) 19 Cal.2d 570, 575 [122 P.2d 564, 140 A.L.R. 1328].)

> The grounds for such equitable relief are commonly stated as being extrinsic fraud or mistake. However, those terms are given a broad meaning and tend to encompass almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing. It does not seem to matter if the particular circumstances qualify as fraudulent or mistaken in the strict sense. (Cites omitted) for example, in *Landon v. Landon* (1946) 74 Cal.App.2d 954 [169 P.2d 980], the husband was stranded in China at the outbreak of World War II and consequently, was unable to attend the dissolution proceeding. Aware of her husband's predicament and his unsuccessful attempts to return to this country, the wife concealed those facts from the court. As a result of this concealment, a default judgment was entered. When the husband asked the trial court to vacate its judgment, the court granted his motion and the Court of appeal affirmed. **It held that '[t]he concealment of facts which, if revealed to the trial court, might result in the postponement of an adjudication until the absent party can be heard constitutes extrinsic fraud.'** (Id., at p. 957) (emphasis added) *In re Marriage of Park,* (1980) 27 Cal. 3d 337, 342; 165 Cal Rptr. 792, 612 P.2d 882.

(Petition for Writ of Error Coram Vobis pages 42 - 43)

Thus, according to the California Supreme Court opinion in *Park,* opposition legal counsel was under an affirmative duty to not mislead the trial court into believing that "[p]laintiff has done *absolutely nothing with this case since serving the complaint . . . "* when he possessed specific knowledge to the contrary.

As to opposition legal counsel's new false statement to the U. S. Supreme Court that "Petitioner took no further steps to prosecute his legal malpractice action for

more than three years," the following conclusive evidence to the contrary was presented previously to the Sixth District Court of appeal. This information, therefore, should now be within opposition legal counsel's sphere of knowledge.

> The malpractice attorney who agreed to draft the complaint on this "short fuse" legal malpractice action did so only on the condition that it be filed in proprius persona. Within two days of completion of the malpractice attorney's complaint preparation, I personally filed the lawsuit and personally arranged that the defendants be served *immediately.*
>
> Shortly thereafter, I personally located and retained an expert witness in employment law, Dan Bacon, to evaluate fully my case. Following the reading of the book manuscript by the expert witness and a personal interview with me regarding the merits of my case, he wrote a letter to my malpractice attorney requesting that she subpoena specific records and documentation from A-P's former employer. (See Exhibit W.)
>
> When I called my malpractice attorney to arrange payment for this service, she told me that she was refusing to prepare the subpoena but would not state any reason for her refusal to do so. I then requested, through his paralegal secretary, that the expert witness draft the necessary subpoena. The expert witness never responded to the request and on October 4, 1988, the manuscript was returned to me by certified mail. The accompanying cover letter stated that since my malpractice attorney had never responded to his request that she issue the discovery subpoena, he assumed his services as an expert witness were no longer needed. No reference was made in the letter to my request

that he issue the discovery subpoena. (See Exhibit X.)

I made another attempt in November, 1989 to put together a legal team of an expert employment law witness and a malpractice attorney. This effort failed as well although I did get the agreement of a published expert in employment law to act as an expert witness in the malpractice case. Also failing was my attempt to early 1991 to move forward with this case by asking the expert witness that reviewed my manuscript in 1989 to issue the necessary subpoena against my former employer. (See Exhibit Y for written communications exchanged between expert witness Mark S. Rudy and Petitioner-Plaintiff.)

With no other choice available to me, I enrolled in 1991 in the paralegal program at the University of San Francisco in order to educate myself well enough in the basics of the necessary law, i.e. civil procedure before trial, employment law, and malpractice law, to pursue this case. For the first course, Civil Procedure Before Trial, I had to meet personally with the instructor to discuss acceptance into her class without two standard prerequisites. I was granted permission to enter her class on the condition that I would never discuss any aspect of my case in class. We shook hands on the deal and I kept my part of the agreement.

I had a full time job and attended night school. The class assignment work was extensive and had to be done nights and on the weekends. Taking one course each quarter for four successive quarters, I received "high-passes" in the three of the four courses: Civil Procedure Before Trial I & II and Legal Research & Writing I (see Exhibit Z for a copy of a letter from the University of San Francisco indicating the grades

> received by Petitioner-Plaintiff). Without these basic courses and the knowledge thus obtained, I knew that I stood absolutely no chance whatever against an experienced lawyer, even in the civil procedure before trial aspects of this case.
>
> As an objective measure of my ability, intent, and resolve to pursue this case, I offer into evidence a special permission, case-related class project from my fourth and final course in the paralegal program at the University of San Francisco. Based upon defense counsel's answer to the original malpractice complaint, I drafted a memorandum of points and authorities to counter my legal adversary's anticipated first line of defense, i.e. the statute of limitations on the filing of the malpractice action itself. See exhibit Z for a copy this class project with hand-written instructor comments (what attorneys refer to as marginalia).
>
> With the legal training from the University of San Francisco, I issued the vital discovery subpoena upon my former employer. The process server noted that the typed form that I had used did not have the stamped name of Grace K. Yamakawa, County Clerk. So, a handwritten deposition form had to be written by me in its place. (See Exhibit AA for a copy of the deposition subpoena and party notification).

(Petition for Writ of Error Coram Vobis pages 26 - 28)

For opposition legal counsel to claim *now* in statement to the U. S. Supreme Court that "Petitioner took no further steps to prosecute his legal malpractice action for more than three years" is, at best, disingenuous.

POINT IN OPPOSITION #2.

"[T]here is no authority that would mandate review or reversal of the California Superior Court's judgment of

dismissal for Petitioner's failure to prosecute." (Brief in Opposition to Petition for Writ of Certiorari – Page 5.)

REPLY TO POINT IN OPPOSITION #2.

This statement is simply not true. The California Supreme Court itself provided the basis for review and reversal and it was disclosed to opposition legal counsel in the Petition for Writ of Error Coram Vobis as follows:

> "In determining the reasonableness of [Petitioner-Plaintiff's] delay in filing the motion [to vacate judgment], this court is 'guided by the applicable statute of limitations for an action at law. . . . ' (cites omitted) Code of Civil Procedure section 338, subdivision 4 states that an action for relief on the ground of fraud must commence within three years of the aggrieved party's **discovery** of 'the facts constituting the fraud.' " *In re Marriage of Modnick*, 33 Cal. 3d 897, 9091 191 Cal. Rptr. 629 (emphasis added) Again, Petitioner-Plaintiff did not discover the frauds committed by Attorney-Defendant and his legal counsel until December 16, 1992, the date set for deposition of Petitioner-Plaintiff's former employer. "Where a judgment has been obtained through extrinsic fraud it may be set aside, though long since final. . . . " *Neubrand v. Superior Court*, 9 Cal. App. 3d 31, 88 Cal. Rptr. 586 (1970).

(Petition for Writ of Error Coram Vobis page 31.)

Obviously, the California Supreme Court used the discovery date to begin the running of the statute of limitations in order to ensure proper punishment of those parties and attorneys that would fraudulently abuse the judicial process. For opposition legal counsel to claim now that "there is no authority that would mandate review or reversal of the California Superior Court's judgment of dismissal for Petitioner's failure to prosecute" is, at best, disingenuous.

FINAL COMMENTS

In his petition to the U. S. Supreme Court, Petitioner asked a series of closely related questions that had been asked previously in petition to the Sixth District Court of Appeal and repeated to the California Supreme Court:

> And this Court of Appeal might also question why Attorney-Defendant and his legal counsel waited? Why did they wait until the uncontested hearing on their motion for involuntary dismissal of Plaintiff's malpractice lawsuit before claiming "He (Plaintiff) was never my client." Why was this "true" fact not the answer made by Attorney-Defendant's legal counsel to the original legal malpractice complaint? Wouldn't it have been better to end this "unmeritorious" legal malpractice lawsuit sooner rather than later?

(Petition for Writ of Certiorari – page 17.)

According to Rule 33 of the Rules of the Supreme Court of the United States (Sup. Ct. R. 33), opposition legal counsel in its brief in opposition had twenty-five pages available to answer this simple series of questions. Opposition legal counsel chose not to make any answer.

This case boils down to an examination of Exhibit "A," the book manuscript. The evidence is all there with the Sixth District Court of Appeal; it just has to be read. No honest, reasonable person reading the book manuscript could possibly believe that there was not a contract for legal services between the litigation parties. All charges and insinuations to the contrary are deceptive and groundless.

Respectfully submitted,

David Lockmiller
In Pro Per
1552 Redwood Highway
Corte Madera, CA 94925
(415) 924-0550